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No. 01-808

In the Supreme Court of the United States

RONALD P. HAMM, SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA, AND DENNIS H. TREACY, JR., DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY, COMMONWEALTH OF VIRGINIA

Petitioners,

v.

WASTE MANAGEMENT HOLDINGS, INC., HALE INTERMODAL MARINE COMPANY, WEANACK LAND LIMITED PARTNERS, CHARLES CITY COUNTY, AND BRUNSWICK WASTE MANAGEMENT FACILITY

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts erred in concluding that the evidence that the challenged statutes were motivated by an intention to discriminate against out-of-state waste justified application of strict scrutiny.

2. Whether the lower courts erred in concluding that the challenged statutes were not the least discriminatory means of furthering a legitimate state interest.

3. Whether the lower courts erred in concluding that the contention that New York violated the Commerce Clause by "dumping" waste into interstate commerce is not a valid defense to respondents' Commerce Clause claims.

RULE 29.6 STATEMENT

Waste Management Holdings, Inc., is a wholly owned subsidiary of Waste Management, Inc. Hale Intermodal Marine Company and Weanack Land Limited Partners are not publicly held and do not have any parent corporations. Brunswick Waste Management Facility is a wholly owned subsidiary of Allied Waste North America, Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

As it comes to this Court, this case involves three provisions of Virginia law that were enacted for the avowed purpose of limiting the importation of municipal solid waste ("MSW") for disposal in Virginia. Both courts below found the evidence of discriminatory animus to be overwhelming and both courts held that the challenged provisions were not the least discriminatory means of achieving any legitimate state interest. Those rulings constitute straightforward applications of well-established Commerce Clause principles that do not warrant this Court's review.

STATEMENT

1. ***MSW Landfills in Virginia.*** There are seven state-of-the-art "regional" landfills and 63 "local" landfills in Virginia that accept MSW. C.A. App. 497.[1] Respondent Waste Management Holdings, Inc. ("WMH") operates five of the regional landfills (*ibid.*), and respondent Brunswick Waste Management Facility, Inc. ("Brunswick") operates a sixth (*id.* at 467). Each of the regional landfills was designed and constructed to meet or exceed stringent state and federal standards, including all requirements established by Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* *Id.* at 468, 497, 888. By contrast, many of Virginia's 63 "local" landfills do not meet Subtitle D standards and have been documented to be contaminating the groundwater. *Id.* at 513, 515-526.

The regional landfills were developed with the expectation that they would receive substantial volumes of MSW, including out-of-state MSW. *Id.* at 469, 498. Each of the regional landfills in fact receives substantial quantities of waste

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[1] Citations to the joint appendix in the Fourth Circuit are designated "C.A. App. __."

generated outside of Virginia. *Id.* at 499-500. According to a November 1998 report issued by the Virginia Department of Environmental Quality ("DEQ"), more than 70% of the MSW received by the seven regional landfills was generated outside Virginia, accounting for 97% of Virginia's imported waste. *Id.* at 499-500, 511. By contrast, 53 of the 63 local landfills received no out-of-state waste, and the remaining ten accounted for only 3% of Virginia's total waste imports. *Id.* at 500.

2. ***WMH's Contracts to Dispose of Waste Generated in New York City.*** For several decades, New York City had disposed of its residential MSW at the Fresh Kills landfill in Staten Island. C.A. App. 472. In 1997, Mayor Rudolph Giuliani announced that the Fresh Kills landfill would cease receiving waste by December 31, 2001. *Ibid.* Thereafter, the New York City Department of Sanitation began to seek interim contracts for the disposal of residential MSW elsewhere. *Id.* at 473. WMH was awarded several of these interim contracts and began transporting a significant amount of this waste to its Virginia landfills. *Ibid.* WMH also submitted a proposal for a long-term contract to dispose of up to 12,000 tons per day of New York's residential MSW after the closing of Fresh Kills. *Id.* at 474. The proposal contemplated sending a significant quantity of the waste to landfills in Virginia. *Ibid.*

WMH also receives for disposal approximately 8,000 to 10,000 tons per day of commercial MSW (*i.e.*, waste from stores, restaurants, and other non-industrial sources) generated in the New York City area. *Id.* at 490. In 1998, WMH decided to begin transporting some of this waste to Virginia by barge. *Ibid.* It entered into negotiations with respondent Hale Intermodal Marine Company to barge the MSW to the James River facility, with the expectation of beginning barging in March or April 1999. *Id.* at 491. WMH also purchased 400 double-walled steel containers designed to meet the standards for the waterborne transportation of MSW set forth in Va. Code § 10.1-1454.1. *Ibid.* These containers are substantially sturdier than conventional containers and are more protective of the

environment than many of the vessels that are routinely used to ship commodities more hazardous than MSW on Virginia's waterways. *Id.* at 465-466.

3. ***Virginia's Hostile Reaction to the Increased Importation of Out-of-State MSW.*** In June 1998, DEQ released a report indicating that Virginia had imported 788,000 tons of solid waste in the fourth quarter of 1997 and that most of the waste was being disposed of at the regional landfills. C.A. App. 564-565. This information, combined with reports that WMH planned to ship increasing amounts of New York MSW to Virginia, much of it by barge, triggered an almost-immediate "not-in-my-backyard" response by the Commonwealth's legislators and public officials. In July 1998, for example, Senator William T. Bolling wrote to Attorney General Mark Earley:

> With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do so, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importations.

Id. at 576.

Further impetus for a legislative attack on out-of-state waste was supplied barely a month later, in August 1998, when the Congressional Research Service released a report indicating that Virginia had become the second largest importer of MSW, disposing of 2.8 million tons of out-of-state solid waste per year. *Id.* at 582.

Consistent with the intention expressed in his July letter to the Attorney General, on September 30, 1998, Senator Bolling announced that he would introduce solid waste legislation in the upcoming legislative session. In the memorandum describing his proposals, he stated that Virginia "is currently

the second largest importer of out of state waste in the nation"; that "the pressure to import larger amounts of out of state waste to Virginia will increase dramatically in the next few years"; that WMH "recently announced a new contract with New York City that could bring up to 2,400 tons of garbage a day to Virginia," most of which "will be transported by barge on Virginia's waterways"; and that "the vast majority" of garbage "currently disposed of in the Fresh Kills landfill * * * may be heading to Virginia." *Id.* at 601.

On the same day, Senator Bolling issued a press release stating in part:

> There is tremendous excess capacity in Virginia's landfills today. If we don't act now to cap the total amount of waste that can be disposed of in Virginia's landfills, the amount of waste being brought to Virginia from other states will increase significantly in the next few years. Such caps are the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians.

Id. at 607. Senator Bolling specifically noted that "the pressure to import solid waste to Virginia would increase significantly * * * with the impending closure of the Fresh Kills landfill" and that WMH was "making a $20 million investment in" the James River facility. *Id.* at 606.

In November 1998, DEQ submitted a report on the management of MSW in Virginia. The report observed that the seven regional landfills accounted for 97% of the imported MSW and that 70% of the waste received by those facilities was imported. *Id.* at 503, 505, 511. Soon after receiving the report, Governor Gilmore imposed a moratorium on new landfill development and instructed his Secretary of Natural Resources to "make recommendations to me for consideration at the next regular session of the General Assembly." *Id.* at 610. Later that month, House Speaker Thomas Moss asked

rhetorically: "If out-of-state trash is such a good thing, why doesn't New York State keep it there?" *Id.* at 40, 152.

Meanwhile, Virginia's status as a leading importer of waste and the plans of WMH to dispose of New York MSW in Virginia were becoming widely publicized. In January 1999, the Center for Public Policy at Virginia Commonwealth University announced that, "[b]y a margin of nearly ten to one, Virginians favor limiting the amount of out-of-state garbage coming into Virginia." *Id.* at 611. Also in January, *The Washington Post* reported that WMH planned to ship 3,900 tons per day of New York MSW by barge to the Charles City County Landfill. *Id.* at 614-615. In response, Senator Bolling stated that "[t]his ratchets up the importance of the General Assembly doing something substantive this year to address the problem." *Id.* at 96, 173. Governor Gilmore's press secretary announced that the Governor was "outraged that this additional garbage is coming into the Commonwealth" and would call for legislation limiting imports of out-of-state waste. *Ibid.*

Delivering his State of the Commonwealth address the next day, Governor Gilmore stated that he was "deeply concerned about the importation of out-of-state trash," specifically noting that "a major company [had] announced plans to import four thousand more tons of New York City trash into Virginia per day." *Id.* at 630. He added:

> I believe the Commonwealth has a right — and I would say a duty — to ban the use of barges for the transportation of garbage on Virginia's waterways!
>
> I'll ask the General Assembly to enact such a ban to impose tough new permit requirements on the construction or expansion of new landfill space, caps on the amount of waste that can be deposited in Virginia landfills and increased inspections of waste being hauled by truck or other means.

Ibid. A few days later, the Governor publicly released a letter to Mayor Giuliani. Among other things, the letter stated:

> I am greatly concerned by your recent comments regarding the transport of New York City's municipal waste to Virginia and the policy you announced in December to increase exports of waste to neighboring states. * * * Let me assure you that the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds.
>
> Over the past two weeks, one company in Virginia has tripled its shipments of New York's municipal waste to Virginia landfills to approximately 3,000 tons a day. The company also reports that it expects shipments to increase to roughly 2.2 million tons per year by 2002. Already, Virginia ranks as the second largest importer of municipal solid waste, behind only Pennsylvania. This is highly unacceptable.

Id. at 633-634.

The following week, Governor Gilmore announced that he was proposing, and that Senator Bolling would be the principal sponsor of, three solid waste bills, stating:

> The home state of Washington, Jefferson, and Madison has no intention o[f] becoming the nation's dumping grounds. * * * That is why I've asked Senator Bolling to sponsor these bills that will increase state regulations on landfills, cap daily landfill deposits, and ban trash barges on Virginia's waterways.

Id. at 635.

Senator Bolling promptly followed with a memo to the members of the Solid Waste Subcommittee of the Senate Committee on Agriculture, Conservation, and Natural Resources (the "Solid Waste Subcommittee"), stating:

Earlier this year, the [DEQ] published their first written report quantifying the amount of waste that was being placed in Virginia's landfills. Surprisingly, this report indicated that Virginia was receiving 3.2 million tons of garbage from other states, primarily New York. * * * Virginia was identified as the second largest importer of waste in the nation.

Unfortunately, the amount of garbage being imported to Virginia has grown dramatically in the past year. That is primarily due to the impending closure of the Fresh Kills landfill in New York City, and the fact that Waste Management, Inc., who owns most of the large regional landfills in Virginia, has received the contract to handle the relocation of the Fresh Kills waste stream.

* * *

[W]e may have to site an entire generation of new landfills in Virginia 20 years sooner than we would otherwise have to do simply because our current landfill space is being filled up by waste from other states.

* * *

[T]hese waste deposits could create long term environmental problems for Virginia. * * * While we have no choice but to assume this burden for our own waste, we should feel no obligation to assume that burden for the waste of other states.

* * *

I would suggest that becoming the nation's "King of Trash" is not consistent with the image we have tried to promote for Virginia. * * * How can we possibly promote Virginia as the Silicon Dominion of the 21st century while we stand idly by and allow Virginia to become the largest importer of garbage in the nation.

Id. at 637-638; see also *id.* at 644-650. Meeting with the Solid Waste Subcommittee a few days later, Senator Bolling again made it clear that the legislation was designed to address the problem of out-of-state waste, stating:

> [E]ven though the headlines in the newspapers talk about New York trash, it is not just a New York problem. It is a problem where this waste is now coming to Virginia from 24 other states and Puerto Rico.

Id. at 672.

While the General Assembly was considering the legislation, a group called Campaign Virginia was aggressively lobbying for limitations on out-of-state waste. Campaign Virginia sent letters to legislators emphasizing that Virginia was "**the #2 importer of trash** in the nation" and that "[t]he major waste companies are negotiating with New York City for the privilege of carting the 4.3 million tons of the City's garbage." *Id.* at 1351 (emphasis in original).[2] It ran radio advertisements encouraging voters to inform their legislators "that Virginia's had all the garbage we're going to take." *Id.* at 1353. The Sierra Club, too, encouraged voters to write members of the General Assembly that "Virginia citizens have said enough" to importation of out-of-state waste, and to request that legislators declare support for legislation "ban[ning] the barging of municipal solid waste on Virginia's waters." *Id.* at 1358.

The antipathy toward out-of-state MSW was exemplified in Delegate Donald L. Williams's speech on the floor of the General Assembly:

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[2] In an amicus brief filed with the district court, Campaign Virginia stated that, "[i]n pursuit of the legislation herein challenged, [it] contacted more than 300,000 people, from whom approximately 15,000 letters and several thousand telephone calls went to legislators." Dist. Ct. Doc. # 80, at 1.

> Do we want to be known as the capital of garbage?
>
> Maybe we need a new bumper sticker — instead of Virginia is for lovers, what about Virginia is for garbage? Or how about a special license plate with a dumpster on it?
>
> Mr. Speaker, I do not believe we need to be the capital of garbage in our state. Do you believe any large corporation would locate in the garbage capital of the country?
>
> What a message we are sending, buy a home, live in the great Commonwealth, the number one importer of garbage.

Id. at 1007. Each of Delegate Williams' rhetorical questions was greeted with a chorus of "nos" from the assembled body (*ibid.*), which shortly thereafter enacted the legislation.

4. ***Virginia Enacts Legislation that Effectuates its Discriminatory Purpose.*** The legislation enacted by the General Assembly and signed by the Governor was carefully crafted to frustrate at every turn the stated plans of WMH for the transportation and disposal of New York waste. The provisions include:

a. ***The cap.*** Va. Code Ann. § 10.1-1408.3 (hereinafter "the cap") provides in relevant part:

> A. The amount of municipal solid waste received at any landfill authorized to accept such waste shall not exceed an average of 2,000 tons per day, or the documented average actual amount of municipal solid waste received by such landfill on a daily basis during 1998, * * * whichever is greater, unless the landfill has received approval from the [Virginia Waste Management] Board pursuant to subsection B for a larger tonnage allotment.

The legislative history reflects that the cap was deliberately gerrymandered to ensure that it would affect only the regional landfills. An early draft of the provision would have limited ***all*** landfills to a 5% increase over 1998 volumes. After local governments objected that this provision would unduly restrict the growth of local landfills handling only Virginia waste, the bill was amended to allow the greater of 1998 volumes or 2,000 tons per day. C.A. App. 665; see also *id.* at 1065-1067 (testimony of director of public waste authority that he expressed concerns to Senator Bolling that the original cap provision would adversely affect the local landfills). DEQ provided Senator Bolling with information confirming that the 2,000 tons-per-day cap would restrict the expansion of the regional landfills while having no impact on local landfills. *Id.* at 666, 1059-1060.

Armed with DEQ's statistics, Senator Bolling informed the Solid Waste Subcommittee that "[t]he vast majority of [MSW] received at the seven regional landfills in Virginia comes from other states" (*id.* at 667) and provided data showing that six of those seven landfills would be affected by the cap. *Id.* at 667-671. He also assured the Subcommittee that ***only*** those landfills would be affected, explaining that "[e]very other landfill in Virginia is significantly below 2,000 tons" and that "most local landfills in Virginia are below 100 tons a day." *Id.* at 673.

b. ***The prohibitions on transportation of MSW by vessel.*** The General Assembly also amended Va. Code § 10.1-1454.1 to effectively prohibit the use of barges to transport MSW into Virginia. Governor Gilmore articulated the discriminatory motive underlying the amendments, stating at the time they were introduced: "Barge traffic is a cheap and easy way to import trash from far distances. If we can put the clamps on that, then we can address the issue of trucks." C.A. App. 675.

To "put the clamps" on barge traffic, the General Assembly modified an existing statute (enacted the preceding year)

requiring the Virginia Waste Management Board to promulgate regulations governing the commercial transportation of solid waste on vessels upon the navigable waters of Virginia. Va. Code Ann. § 10.1-1454.1.A. Although existing law already required the Board to promulgate regulations that would protect human health, safety, and the environment, the new legislation specifically directed the Board to issue a regulation requiring that "containers [of solid waste] be stacked no more than two high on barges." *Id.* § 10.1-1454.1.A(d) (the "container-stacking limitation"). The new legislation also prohibited all barging of waste to any Virginia facility until the required regulations became effective. *Ibid.*

While the latter provision would have put in place an immediate ban of indefinite duration on barging to Virginia landfills, the container-stacking limitation would effectively preclude barging permanently. Barges that carry containerized MSW ordinarily are loaded with containers stacked five high. C.A. App. 489. It would more than double the shipping costs per ton, and thus make it economically impracticable to ship MSW by barge, if the waste containers could be stacked only two high. *Id.* at 491. Moreover, because only an insignificant amount of MSW is shipped by vessel within Virginia (*id.* at 501), and because none of that waste is shipped on container barges (*ibid.*), the container-stacking limitation would have no effect on the transportation of Virginia's waste.

Adopting a "belt-and-suspenders" approach to preventing the barging of MSW to Virginia, the General Assembly also specified that "the commercial transport of hazardous or nonhazardous solid waste * * * by ship, barge or other vessel upon the navigable waters of the Commonwealth is prohibited on the Rappahannock, James and York Rivers." Va. Code Ann. § 10.1-1454.2 (the "three-river ban"). By blocking its access to three major waterways, this provision would have prevented WMH from using barges to transport out-of-state MSW to its Virginia landfills. C.A. App. 501. The provision would have had no impact, however, on the only in-state solid waste that is

transported by vessel, which is shipped over the Chesapeake Bay. *Ibid.*

c. ***The trucking restrictions.*** Well aware that substantial amounts of out-of-state MSW are imported into Virginia on trucks having four or more axles, the General Assembly enacted restrictions on such vehicles that do not apply to the smaller two or three-axle vehicles that carry mostly Virginia waste.

First, the General Assembly prohibited landfill operators from accepting MSW from a vehicle with four or more axles "unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility." Va. Code Ann. § 10.1-1408.1.Q (the "certification requirement"). Because virtually all out-of-state MSW that is transported by truck is delivered in vehicles having four or more axles (C.A. App. 482, 501-502), while the majority of Virginia MSW is delivered to landfills in vehicles with fewer than four axles (*id.* at 484), the certification requirement would have imposed a disproportionate burden on the transportation of out-of-state waste.

Second, the General Assembly required the Board to develop regulations governing the "commercial transport" of MSW by "any tractor truck semitrailer combination with four or more axles." Va. Code Ann. § 10.1-1454.3.A, D. Among other things, the new regulations must require that, as a condition of carrying MSW on Virginia roads, the owners of such trucks make financial assurances that trucks having fewer than four axles or carrying other cargo need not make. *Id.* § 10.1-1454.3.A(2). The regulations also must provide that containers and trailers carrying waste "be designed, constructed and maintained so as to * * * prevent the escape of wastes and liquids and to prevent the loss or spillage of wastes to the extent possible in the event of an accident" (*id.* § 10.1-1454.3.A(1)) and prohibit covered vehicles from transporting waste "unless

the containers carried thereon are designed, constructed, loaded, operated and maintained in accordance with the regulations developed pursuant to subsection A." *Id.* § 10.1-1454.3.C. The new provisions also include spill reporting and cleanup obligations, the violation of which is a Class 1 misdemeanor. *Id.* § 10.1-1454.3.B, C.

Five-axle tractor-trailers are used to carry waste from transfer stations to disposal sites, but are not used to collect waste from individual generators. C.A. App. 482. Virtually all of the out-of-state MSW transported by truck to Virginia goes through transfer stations and is delivered on commercially operated tractor-trailers having four or more axles. *Id.* at 482, 501-502. By contrast, only about 24% of Virginia-generated waste is processed through transfer stations and loaded onto tractor trailers, and about one-quarter of that tonnage is carried by Southeastern Public Service Authority ("SPSA"), a public entity. *Id.* at 483. Because SPSA is arguably exempt from the provisions by the limitation to "commercial transport," only about 18% of Virginia-generated waste is affected at all by the provision. *Ibid.* Thus, although the new provisions purport broadly to govern the "[t]ransportation of [m]unicipal [s]olid and [m]edical [w]aste by [t]ruck," in fact they apply principally to trucks carrying MSW in interstate commerce, while leaving unregulated the transportation of at least 76%, and as much as 82%, of Virginia's waste.

There can be little doubt that the discriminatory effect of the trucking provisions was intended. In his September 30, 1998 press release, Senator Bolling stated that the regulations required by his proposed legislation "should include minimum standards for the containers waste is transported in, as well as an aggressive inspection and monitoring program to make sure that ***waste coming to Virginia*** is being transported appropriately." *Id.* at 608 (emphasis added). His January 26, 1999 memo to the Solid Waste Subcommittee also signaled his goal of reducing the flow of interstate MSW, stating: "It is entirely possible that these regulations could have the impact of

actually reducing garbage truck traffic on Virginia's highways." *Id.* at 642. Because the provisions carve out the traffic carrying the overwhelming majority of waste generated in Virginia, it is obvious that the reduction that Senator Bolling anticipated was in vehicles carrying ***out-of-state*** MSW. Governor Gilmore's statement linking the regulation of trucking to the goal of reducing out-of-state waste (*id.* at 675) confirms that he shared Senator Bolling's discriminatory views.

5. ***Proceedings Below.*** Respondents WMH, Hale, Weanack, and Charles City County jointly filed a complaint against Governor Gilmore and other state officials, alleging that the cap, the barging restrictions, and the trucking limitations violated the Commerce Clause and that the barging restrictions also were preempted by federal law. Shortly thereafter, respondent Brunswick Waste Management Facility filed a similar complaint, after which the two cases were consolidated.

The day before the legislation was to go into effect, the district court preliminarily enjoined the cap and the barging restrictions, stating that "both sets of restrictions are almost certainly invalid under the Commerce Clause." Pet. App. 83-84. The court explained:

> The timing of the General Assembly's actions and the statements made by the legislation's chief proponents, including Governor Gilmore, leave no room for doubt that it was enacted with one overriding purpose: to restrict the importation of out-of-state waste, particularly New York waste, into the Commonwealth.

Id. at 88. The court also stated that "there is no question but that the practical effect of both the barging restrictions and the cap provision will be to burden the flow of out-of-state waste across Virginia's borders while leaving in-state waste unaffected." *Id.* at 89. See also *id.* at 88 (finding that the provisions "are plainly discriminatory in both their purpose and 'practical effect'").

Thereafter, the defendants filed an answer and a motion to join New York City as an involuntary plaintiff. The answer raised as an affirmative defense the contention that "the acts of New York City and/or New York State to discourage or prevent disposal of [MSW] in the City and in the State also violate the Constitution and public policy and distort interstate commerce." C.A. App. 179. On plaintiffs' motion, the district court struck this defense (Pet. App. 147-153), noting that defendants' theory that New York violated the Commerce Clause by exporting its waste was contradicted by "abundantly clear" case law providing that "the Commerce Clause is implicated when a state *restricts* the flow of waste across its borders," not when "it *utilizes* the channels of interstate commerce to meet its waste disposal needs." *Id.* at 151 (emphasis in original). The court also denied the defendants' motion to join New York City as a plaintiff, stating: "[E]ven if the Commonwealth could demonstrate that the City has somehow violated the Commerce Clause, it is not entitled to retaliate by discriminating against interstate waste. Such 'tit-for-tat' protectionism is precisely the sort of thing that the Framers sought to avoid by giving Congress, and not the states, authority to regulate interstate commerce." C.A. App. 215.

After discovery, the district court granted plaintiffs' motion for summary judgment, holding each of the challenged provisions invalid under the Commerce Clause.[3] Finding that "Virginia appears to have adopted measures that would frustrate or preclude the importation of MSW at every turn" (Pet. App. 141), the court ruled that the provisions were subject to strict scrutiny and that they plainly failed that test. First, the court held that the defendants had failed to demonstrate "that no adequate, nondiscriminatory alternatives exist that would

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[3] Because the district court's memorandum opinion did not mention the trucking restrictions, WMH filed a motion for clarification. The court confirmed that "[s]ummary judgment was granted as to the trucking provisions," and that its memorandum opinion "appl[ied] fully" to those provisions. *Id.* at 1416.

protect local interests just as well as the disputed statutes," while plaintiffs — who were not obligated to do so — had "offered some possible alternatives to the disputed statutes." *Id.* at 141-142. Second, the court rejected Virginia's contention that "the disputed statutes are demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 142-143 (internal quotation marks omitted). According to the court, "[t]he tenor of public discussion * * * makes clear that Virginia was motivated by economic protectionism, and therefore any post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource preservation are ineffectual." *Id.* at 144.

The Fourth Circuit affirmed in part and vacated in part. After setting forth the extensive evidence of hostility toward out-of-state waste on the part of the Governor and General Assembly (*id.* at 31-39), the court concluded: "No reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into Virginia for disposal." *Id.* at 39-40. The court then proceeded to conclude that three of the provisions at issue — the cap and the two trucking provisions — failed the virtually *per se* rule of invalidity that applies to discriminatory statutes. *Id.* at 42-48, 49-51. The court concluded that an issue of fact remained as to whether the two barging provisions were the least discriminatory means of furthering a legitimate state interest (*id.* at 48-49), but concluded that the three-river ban was preempted by federal vessel documentation laws (*id.* at 57-58). Accordingly, the court remanded for a trial on whether the stacking limitation is the least discriminatory means of accomplishing Virginia's legitimate interest in preventing contamination of its rivers from unintended MSW spills.

REASONS FOR DENYING THE PETITION

Petitioners urge review of three issues. The third is patently frivolous. The first and second constitute nothing more than quibbles with the Fourth Circuit's application of well-established Commerce Clause principles. None warrants certiorari, much less overturning the decisions of both courts below.

1. Petitioners first urge the Court to grant certiorari in order to establish the standard applicable to statutes motivated in part by discrimination and in part by legitimate concerns. Review of this issue is unwarranted for several reasons.[4]

First, petitioners never squarely raised this issue in the court of appeals. Instead, they contended that our evidence was insufficient to show that the legislature acted with discriminatory motives, asserting that (i) we were required to prove "that a majority or at least a significant bloc of legislators acted with the prescribed motive" (Opening Brief of Defendants-Appellants at 43); (ii) "the vast majority of evidence submitted by Plaintiffs in support of their summary judgment arguments was not admissible" (*id.* at 44); (iii) "[a]t best, Plaintiffs' evidence indicates that a few Virginia office-holders, including the Governor, were aware of the problems

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[4] Petitioners also imply that the Court should grant review to determine whether discriminatory intent alone — *i.e.*, in the absence of facial discrimination or discriminatory effect — is enough to trigger strict scrutiny. Pet. 15. They waived any such contention below by conceding in their opening brief in the court of appeals:

> A statute can discriminate against out-of-state interests in one of three ways: (1) facially, (2) purposefully, or (3) in effect. If the statute discriminates in one of these ways, the court applies a "strict scrutiny" analysis under which the statute is invalid unless justified by a valid factor unrelated to economic protectionism and there are no less restrictive alternatives.

Opening Brief of Defendants-Appellants at 41 (citation omitted).

and dangers associated with interstate waste in Virginia" and that "[s]uch 'evidence' unquestionably fails to establish discriminatory motivations of the 138 members of the Assembly who voted on this legislation" (*id.* at 45); (iv) "Plaintiffs did not present specific evidence of intent regarding each statute being challenged" (*ibid.*); and (v) "[i]n any event, the Commonwealth presented ample evidence rebutting any notion of improper motive by the General Assembly" (*id.* at 46).[5] Indeed, petitioners obliquely acknowledge that they raised entirely different arguments below than they do now, stating: "In proceedings below, the Commonwealth disputed the allegation of discriminatory motives; however, that dispute is not at issue in this petition." Pet. 16 n.7.

Second, petitioners have failed to demonstrate (or even assert) that the decision of the Fourth Circuit conflicts with either prior decisions of this Court or the decisions of any other federal court of appeals or state supreme court.[6] The best they can do is to assert that a rule that strict scrutiny applies

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[5] Petitioners did at one point assert that we "did not even come close to demonstrating, *as a matter of law*, that a majority of the Virginia General Assembly enacted this legislation for the sole purpose of burdening out-of-state commerce." *Id.* at 44 (emphasis in original). However, it is clear from the ensuing sentence that petitioners' argument had to do with whether the statements of a few key participants in the legislative process are sufficient to establish a discriminatory purpose, not whether that purpose had to be exclusive. See *ibid.* ("The crux of Plaintiffs' entire case was that Virginia Governor James S. Gilmore, III, (who is not a member of the General Assembly) and Senator William Bolling, the sponsor of the legislation, were hostile to the flow of waste coming into Virginia from New York.").

[6] As far as we can discern, the only appellate court to address the question directly has held that "in order to find a dormant Commerce Clause violation there is no requirement that discrimination must be the 'primary' purpose or effect." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995).

whenever the legislation was motivated in part by discrimination is inconsistent with this Court's Establishment Clause jurisprudence. Pet. 14, 16, 19. Because petitioners are unable to cite a single lower court decision finding the Establishment Clause standard to be applicable in the Commerce Clause area, any perceived tension with that standard is not a basis for granting review here.[7]

Third, even if the Court were inclined to establish a special standard for mixed purpose cases, this case would be an inappropriate vehicle because, despite petitioners' unsupported assertion to the contrary (Pet. 5), the Fourth Circuit concluded that discrimination against out-of-state MSW was the ***sole*** purpose of the challenged statutes:

> ***No reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into***

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[7] Even if cases from other areas of law were relevant, the standard applied in equal protection cases would be more pertinent than the Establishment Clause standard because, as in equal protection cases, a finding that a law challenged under the Commerce Clause had a discriminatory motivation results in strict scrutiny, not outright invalidation as is the case in the Establishment Clause context (see, *e.g., Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)). In the leading Equal Protection Clause case on the subject, this Court has observed:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. * * * When there is a proof that a discriminatory purpose has been a motivating factor in the decision, * * * judicial deference is no longer justified.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (1977). Needless to say, there is no inconsistency between the Fourth Circuit's decision and the standard articulated in *Arlington Heights*.

> ***Virginia for disposal.*** Indeed, the very purpose the Defendants proffer in this litigation for the enactment of the statutory provisions at issue – to alleviate or at least reduce health and safety threats to Virginia's citizens and environment created by the importation of MSW from states with less strict limitations upon the content of MSW than Virginia – fully supports our conclusion. This is because an inherent component of the Defendants' proffered purpose of Virginia's enactment of the statutory provisions at issue is discrimination against MSW generated outside Virginia.

Pet. App. 39-40 (emphasis added).[8]

Fourth, petitioners are simply wrong in asserting (Pet. 17) that "the case is not cluttered by the two factors that commonly lead to strict scrutiny" — *i.e.*, that "none of the MSW statutes are [sic] discriminatory on their face" and, for the three provisions at issue here, "there has been no showing of a discriminatory effect" (*ibid.* (emphasis omitted)). Although it is undisputed that the statutes are facially neutral, this case is very much "cluttered" by substantial (indeed, we submit, insuperable) evidence that the statutes discriminate in their practical effect. The Fourth Circuit held merely that there existed "a genuine issue of material fact" as to whether the challenged provisions discriminate in their practical effect against out-of-state MSW, not that there was no evidence of discriminatory effect at all. Pet. App. 28, 30. Accordingly, contrary to petitioners' contention, this case does not present an opportunity to consider whether a statute that was animated by

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[8] As the Fourth Circuit recognized, it is well settled that the existence of a legitimate underlying purpose for a statute that employs intentionally discriminatory means does not immunize the statute from strict scrutiny. See *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (citing cases in which "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy").

mixed purposes, but has no discriminatory impact, nonetheless must be subjected to strict scrutiny.

In fact, notwithstanding the Fourth Circuit's holding that issues of fact precluded summary judgment on this basis, the undisputed evidence established to a mathematical certainty that the challenged statutes have a discriminatory effect. That showing would have necessitated application of strict scrutiny even if there had been no evidence of a discriminatory purpose. The overwhelming evidence of discriminatory effect hence supplies an alternative basis for affirmance, and makes this case an even less attractive vehicle for addressing issues relating to discriminatory intent.

With respect to the cap, the undisputed evidence was that the 2,000 ton-per-day limit would immediately impact six of the seven regional landfills that together account for 97% of the out-of-state waste that is disposed of in Virginia. C.A. App. 500, 670. Meanwhile, ***not a single*** local landfill was expected to be affected by the cap. To the contrary, the data provided by DEQ to the General Assembly showed that "[e]very other landfill in Virginia is significantly below 2,000 tons." *Id.* at 673. It is hard to imagine a clearer showing of discriminatory effect.

The Fourth Circuit found there to be a dispute of fact on the basis of petitioners' contention that our declarant did not have first-hand knowledge of the future capacity needs of the local landfills. In particular, the Fourth Circuit noted that one local landfill had filed a request for a waiver of the cap. Pet. App. 27-28. But even if true, the fact that one local landfill might someday need to exceed the cap (but see C.A. App. 1002) does not render the statute nondiscriminatory. Even then, the cap would immediately burden 85.7% (six out of seven) of the regional landfills that account for 97% of the out-of-state MSW, while similarly burdening at most 1.6% (one out of 63) of the local landfills. Under this Court's consistent case law, that kind of massive disparity in the treatment of intrastate

versus interstate commerce is more than enough to demonstrate discriminatory effect as a matter of law. See, *e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (flow control ordinance that required that all waste in the town be processed at designated transfer station "is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 361-363 (1992) (striking down law permitting local governments to ban out-of-county waste from their landfills even though the law affected a substantial amount of in-state waste along with all out-of-state waste); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating ordinance prohibiting sale of milk unless pasteurized within five miles of city even though prohibition affected substantial amounts of in-state milk along with all out-of-state milk); *Brimmer v. Rebman*, 138 U.S. 78, 81-83 (1891) (striking down prohibition on sale of meat slaughtered more than 100 miles from point of sale even though prohibition burdened some in-state meat producers).

The undisputed evidence also demonstrated that the trucking provisions would have had a discriminatory effect. By limiting the certification requirement to vehicles having four or more axles, the General Assembly ensured that ***all*** trucks carrying out-of-state waste would be burdened (see C.A. App. 482, 501-502), while a substantial percentage of trucks carrying Virginia waste would not be (*id.* at 484). The only dispute involved the exact percentage of local trucks that would be subjected to the requirement. Under the cases just cited, that kind of dispute is insufficient to create an issue of fact as to whether a statute discriminates.

Similarly, there is no dispute that, because it applies only to tractor-trailors with four or more axles, the provision requiring the promulgation of regulations governing the trucking of MSW would burden virtually all vehicles carrying out-of-state waste (see C.A. App. 482, 501-502) but would not affect the vast majority of trucks carrying Virginia waste. In the district

court, we adduced evidence that between 76% and 82% of Virginia waste is carried on vehicles that would not be subjected to the truck regulations. *Id.* at 483. Petitioners never disputed that, at most, 24% of Virginia waste is carried on tractor-trailers and that the remaining 76% would not be covered by the required regulations. They merely quibbled with our contention that one-quarter of the Virginia waste carried on tractor-trailers (*i.e.*, 6% of Virginia waste) would be exempt from the regulations on other grounds. Even accepting that 24% and not 18% of Virginia waste would be subject to the regulations while 100% of out-of-state would be covered, that disparity is more than enough to constitute a discriminatory impact.

In sum, the first issue petitioners ask the Court to address was neither presented nor decided by the court of appeals and, even if it had been, this case is not a good one in which to resolve it.

2. The Fourth Circuit accepted *arguendo* that Virginia's definition of waste that may lawfully be deposited in MSW landfills is more stringent in certain respects than the definitions of some of Virginia's sister states. It concluded, however, that a cap that makes no distinction between waste from states that have more stringent definitions than Virginia and waste from states that have less stringent definitions is not the least discriminatory means of ensuring that unacceptable categories of waste do not find their way into landfills located in Virginia. In particular, the Fourth Circuit held that a cap that limits waste from only those states that have less stringent definitions than Virginia's would be less discriminatory than a cap that limits waste from all states. Petitioners' second issue asks the Court to review that conclusion. Review is unwarranted for several reasons.

First, this issue is a narrow, case-specific one that cannot be said to recur in Commerce Clause litigation. Petitioners point to no conflict among the circuits or with the decisions of any

state supreme courts. They do contend that the Fourth Circuit's decision "is contrary" to this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), asserting that "[t]his Court's approval of a *total* ban on a particular product from all States stands in stark contrast to the court of appeals' interpretation." Pet. 21, 22 (emphasis in original). The asserted contradiction is non-existent. In *Taylor*, the Court held that a ban on the importation of live baitfish served a legitimate state interest based on two critical findings of the magistrate: (i) Maine's indigenous fish would be placed at risk by parasites prevalent in out-of-state baitfish, but not common to indigenous fish; and (ii) non-native species inadvertently included in shipments of live baitfish could severely disrupt Maine's aquatic ecology. 477 U.S. at 141, 142-143, 148. Each of these two concerns about out-of-state baitfish applied regardless of the source of the baitfish and therefore supported a ban on all out-of-state baitfish. In the present case, by contrast, Virginia's interest is limited to states whose definitions of MSW are more liberal than Virginia's.[9]

Second, before this Court could even reach petitioners' issue, it would have to address our threshold contention that the "legitimate justifications the State has put forward for its statute are merely a sham or a '*post hoc* rationalization" (*Taylor*, 477 U.S. at 149 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 338 n.20 (1979))) and hence are entitled to no weight. See Pet. App. 144 (district court's conclusion that Virginia's "post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource preservation are ineffectual"). The ample legislative history contains no suggestion that the General Assembly's hostility toward out-of-state waste,

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[9] Petitioners do suggest that an across-the-board limit is warranted because of the possibility that either Virginia or other states will change their laws. Pet. 23. Because such a rationale would permit ***every state*** not just to limit, but to ban, all out-of-state waste — thereby ending interstate commerce in waste — it plainly is an argument that proves too much.

particularly that from New York, was grounded in any qualitative distinction between Virginia's and other states' definitions of acceptable MSW.[10] To the contrary, legislators expressed concern that imported waste would prematurely exhaust Virginia's landfill capacity, impose burdens on Virginia that should be borne by other states, and ruin Virginia's image (see pages 3-9, *supra*) — all of which are improper motivations under the Commerce Clause. See, *e.g.*, *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). Because the proffered justification for the cap was an after-the-fact invention of defendants' counsel and their retained expert witnesses, the cap provision fails strict scrutiny whether or not it can be said to be the least discriminatory means of

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[10] Indeed, several DEQ employees admitted during depositions that DEQ never indicated to the members of the General Assembly that a 2,000 ton-per-day cap was necessary to control unauthorized waste from states with less stringent definitions of MSW. See C.A. App. 754-755, 991, 1246-1247. That is hardly surprising because petitioners' contention (Pet. 20) that "MSW from other States is more dangerous to the public health than MSW from Virginia" is grossly overblown. Petitioners asserted below, for example, that North Carolina allows "liquid blood" in the waste stream, but in fact North Carolina exempts blood from regulation as medical waste only if it is enclosed in an individual container of less than a teaspoon and is segregated and stored in a secure area before offsite disposal. N.C. Admin. Code tit. 15A, r. 13B.1202. The regulations of Maryland, the District of Columbia, New York State and New York City are at least as stringent in their regulation of items contaminated by blood as Virginia's regulations — which allow materials contaminated with "small amounts" of blood to be mixed into the solid waste stream. 9 Va. Admin. Code § 20-120-130.D.2. There was undisputed evidence, moreover, that medical waste and other unauthorized material frequently has been found in waste shipments from in-state sources. C.A. App. 872, 888, 896, 915-950.

accomplishing that objective. See, *e.g.*, *Hutchins v. District of Columbia*, 188 F.3d 531, 567 (D.C. Cir. 1999).

Third, the Fourth Circuit's conclusion is clearly right. Accepting *arguendo* that the rationale for the challenged legislation really does have to do with the fact that certain states have more lenient definitions of MSW than does Virginia, it follows that any cap should be narrowly tailored to address only the waste from those states. Conversely, a cap that limits waste from other states that have similar or more stringent definitions than Virginia plainly is not the least discriminatory means of addressing the putative concern identified by defendants.

Finally, even if the Court were to reach the question whether a cap limited to certain states is a less discriminatory alternative and then conclude that it is not, that would not change the result because we raised several other potential alternatives that Virginia never attempted, much less proved to be infeasible. For example, DEQ could increase inspections of MSW arriving at landfills. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 377 (1976) ("[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, [a state] has the obvious alternative of applying its own standards of inspection" to imported goods). Indeed, DEQ had already requested and received funding to double its inspection force, but, as of the time the summary judgment motion was briefed, had not yet fully deployed those resources. C.A. App. 956, 959.

Virginia could also tighten requirements for self-policing. For example, it could amend its regulations — which now require only periodic, random inspection for hazardous waste (9 Va. Admin. Code § 20-80-250.c) — to require landfill operators to have trained inspectors working at all times. In addition, the Commonwealth could require certification by transporters that the MSW they carry contains no unauthorized material as defined by Virginia's regulations. One of the

provisions struck down in this case contains such a requirement; we challenged that provision only because it was limited to trucks having four or more axles and thereby discriminated against out-of-state MSW. A properly designed, non-discriminatory certification requirement would help to ensure that ***all*** waste brought to disposal facilities in Virginia meets Virginia's regulations, without disproportionately burdening out-of-state waste.

And if a cap of some sort were necessary to promote effective inspections or self-policing, there clearly are less discriminatory alternatives to the gerrymandered cap at issue here. For example, DEQ could be directed to determine for each landfill a cap that takes into account its topography, operating characteristics, and other factors bearing on its ability to be inspected effectively. Indeed, petitioners' own witnesses conceded that the ability to inspect a landfill properly varies with "the application, the design and operation of the facility" (C.A. App. 763) and that "[y]ou can't take a cookie cutter approach to every single facility" (*id.* at 1073). Requiring an individualized determination would be far more even-handed than an arbitrary 2,000-ton-per day cap that limits the growth of the regional landfills, while allowing local landfills to grow without restriction regardless of their amenability to inspection or the quality of their self-policing. Indeed, if Virginia truly were concerned about the risks posed by the shipment of dangerous materials to its MSW landfills, it would have directed its regulatory efforts toward the many local landfills that do not comply with Subtitle D and may be contaminating the groundwater (see page 1, *supra*), rather than to the regional landfills that meet or exceed these federal standards and are far more protective of the environment.

In sum, the Fourth Circuit was clearly correct in holding that the cap is not the least discriminatory means of addressing Virginia's purported concern about differences in the definition of acceptable MSW. Moreover, the question whether the Fourth Circuit misapplied the strict scrutiny standard is a case-

specific one as to which there is no conflict among the courts. Finally, there are both threshold issues and alternative bases for affirmance that cannot be severed from the question presented. Accordingly, this issue is a poor candidate for review.

3. Petitioners' final issue is whether the lower courts erred in rejecting the contention that Virginia was justified in discriminating against out-of-state waste because New York supposedly violated the Commerce Clause by "dumping" waste into interstate commerce. Once again, petitioners can point to ***no*** case from any court that conflicts with the lower courts' resolution of this issue. To the contrary, as the district court noted, petitioners' theory that New York violated the Commerce Clause by exporting its waste was contradicted by "abundantly clear" case law providing that "the Commerce Clause is implicated when a state *restricts* the flow of waste across its borders," not when "it *utilizes* the channels of interstate commerce to meet its waste disposal needs." Pet. App. 151 (emphasis in original).

Moreover, neither the State of New York nor New York City statutorily required that New York City waste be disposed of outside of New York. Instead, the requests for proposal merely indicated a preference for transportation of waste by barge (which is not inherently inconsistent with the use of in-state disposal facilities). In other words, the City was acting as a market participant, rather than a market regulator, which forecloses any possibility that its actions could be deemed to violate the Commerce Clause. See, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) ("There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.").

In any event, even if New York's decision to close the Fresh Kills landfill and to express a preference for the use of barging in its RFPs could be said to have violated the Commerce Clause, that violation would not be a valid defense to our claims because, as the district court explained, "[a] state

may not escape responsibility for violating the Commerce Clause by pointing to another state's violation." Pet. App. 152-153. It is firmly established that discrimination by one state does not justify retaliation by another. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Cottrell*, 424 U.S. at 379-380 (1976).

Finally, as the Fourth Circuit pointed out, "[e]ven assuming arguendo that New York's alleged conduct should legally prevent it from bringing a constitutional challenge under the dormant Commerce Clause to the statutory provisions at issue, at the risk of stating the obvious, neither the State of New York nor New York City is a plaintiff in this litigation." Pet. App. 56. Petitioners do not attack the Fourth Circuit's conclusion that the conduct of a non-party may not be raised as a defense to the claim of a party. Accordingly, even if the Court were to agree with petitioners that the Commerce Clause prohibits "dumping" goods into interstate commerce, such a ruling would not alter the result, and this case therefore is not an appropriate vehicle for addressing the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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